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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HYDROLEVEL CORPORATION,
Petitioner,

v.

AMERICAN SOCIETY OF
MECHANICAL ENGINEERS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 22, 1981

QUESTIONS PRESENTED

1. Whether a key participant in a conspiracy to exclude another from a market can avoid liability for the ultimate effect of his own prior acts in furtherance of the conspiracy by issuing a "suitable retraction."

2. Whether the Court of Appeals erred in holding, *sua sponte,* that a letter issued by a defendant-conspirator constituted a "suitable retraction" of the conspirator's conduct in furtherance of the conspiracy even though the defendant-conspirator never pleaded or argued a theory of "retraction" or "withdrawal" throughout the entire district court and appellate proceedings.

3. Whether, as a matter of law, a letter that "confirmed the intent" of the original unlawful act can constitute a "suitable retraction."

4. Whether the Court of Appeals erred in concluding that the jury's $3.3 million damage award, based upon expert testimony that the plaintiff would have achieved a 10%-25% market share "but for" the conspiracy, was "excessive" because the defendant was "far [less] culpable" than two co-conspirators who had settled with the plaintiff for $800,000 and because the plaintiff had never succeeded in making a profit or in achieving a market share of more than 1%, although:

(a) the plaintiff's damage calculations were prepared pursuant to traditional methods repeatedly enunciated by this Court for estimating the damages of a plaintiff unlawfully excluded from a market;

(b) the plaintiff's damage calculations were admitted into evidence without objection; and

(c) the jury's award was in the range expressly approved as reasonable by the defendant's own damage expert.

THE PARTIES IN THE COURT OF APPEALS

1. Petitioner is the Hydrolevel Corporation.

2. Respondent is American Society of Mechanical Engineers, Inc.

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Petitioner Hydrolevel Corporation ("Hydrolevel") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit reversing a jury verdict of $3.3 million which Judge Jack B. Weinstein, after trial in the United States District Court for the Eastern District of New York, reduced to $2.5 million to account for $800,000 already paid in settlements by the two other co-conspirator defendants.

OPINION BELOW

The opinion of the Court of Appeals appears at 635 F.2d 118 (2d Cir. 1981) and is reproduced in the Appendix to this petition at pages 1a to 26a.

JURISDICTION

The opinion of the Court of Appeals was entered on November 24, 1980. A timely petition for rehearing, with a suggestion for rehearing *en banc*, was filed by Hydrolevel and was denied on January 22, 1981. A copy of the order of the Court of Appeals denying the petition for rehearing is reproduced in the Appendix at page 27a. The instant petition is filed within ninety (90) days of that date. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a key participant in a conspiracy to exclude another from a market can avoid liability for the ultimate effect of his own prior acts in furtherance of the conspiracy by issuing a "suitable retraction."

2. Whether the Court of Appeals erred in holding, *sua sponte*, that a letter issued by a defendant-conspirator constituted a "suitable retraction" of the conspirator's conduct in furtherance of the conspiracy even though the defendant-conspirator never pleaded or argued a theory of "retraction" or "withdrawal" throughout the entire district court and appellate proceedings.

3. Whether, as a matter of law, a letter that "confirmed the intent" of the original unlawful act can constitute a "suitable retraction."

4. Whether the Court of Appeals erred in concluding that the jury's $3.3 million damage award, based upon expert testimony that the plaintiff would have achieved a 10%-25% market share "but for" the conspiracy, was "excessive" because the defendant was "far [less] culpable" than two co-conspirators who had settled with the plaintiff for $800,000 and because the plaintiff had never succeeded in making a profit or in achieving a market share of more than 1%, although:

(a) the plaintiff's damage calculations were prepared pursuant to traditional methods repeatedly enunciated by this Court for estimating the damages of a plaintiff unlawfully excluded from a market;

(b) the plaintiff's damage calculations were admitted into evidence without objection; and

(c) the jury's award was in the range expressly approved as reasonable by the defendant's own damage expert.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15, are set forth, in relevant part, in the Appendix to this petition at pages 28a and 29a.

STATEMENT OF THE CASE

This action was instituted in August of 1975 by petitioner Hydrolevel Corporation ("Hydrolevel") against respondent The American Society of Mechanical Engineers, Inc. ("ASME"), and against the International Telephone & Telegraph Corporation ("ITT") and Hartford Steam Boiler Inspection and Insurance Company ("Hartford Steam"). The Complaint charged that the defendants conspired to restrain trade and to monopolize the United States market for boiler water level controls in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Prior to trial, at a time when Hydrolevel was struggling to remain viable, ITT and Hartford Steam settled with Hydrolevel for a total of $800,000. In January 1979, a few weeks before the trial began, Hydrolevel ceased operations and was liquidated.

Trial on the issues of liability and damages was bifurcated by United States District Judge Jack B. Weinstein and the jury returned a verdict in favor of Hydrolevel on each issue, fixing Hydrolevel's damages at $3.3 million. The district court reduced this amount, prior to trebling, by the $800,000 paid by ITT and Hartford Steam in their settlements, resulting in an after-trebling final judgment of $7.5 million against ASME. The district court subsequently denied ASME's motion for judgment notwithstanding the verdict and for a new trial, and denied Hydrolevel's request for the award of an attorney's fee. Cross-appeals were taken to the United States Court of Appeals for the Second Circuit, which affirmed the district court's judgment as to liability but reversed the damage award and the denial of attorneys' fees and remanded the case to the district court for a new trial limited to damages.

Hydrolevel was organized in 1965 for the purpose of manufacturing and marketing a "probe" type boiler water level control developed by one of the company's founders.[1] This device, which incorporated certain patented features and had no moving parts, represented a dramatic departure from existing technology in the field and filled a clear need for innovation and competition in the boiler water level control industry. A single manufacturer, McDonnell & Miller, Inc.,[2] had dominated the market for decades, accounting for up to 85% of industry sales with a product operating on the "float" principle, much like the bulb in the tank of the household commode. The M&M/ITT product had been experiencing a relatively high rate of failures, frequently resulting in boiler explosions or dry-firing and causing serious personal and property damage. There was uncontroverted evidence before the jury that the

[1] A boiler water level control monitors the level of water in a steam or hot water boiler and cuts off the boiler's fuel supply when the water level drops below a predetermined point. The "probe" type control utilizes the presence of water in the boiler to complete an electrical circuit; when the water level falls below the "probe" the circuit is broken and the fuel supply is shut off.

[2] In December 1971, McDonnell & Miller was acquired by ITT. (Hereinafter reference will be made to "M&M/ITT").

"probe" concept, and Hydrolevel's product, was simpler, cheaper to manufacture and — most important — more reliable than the M&M/ITT "float" control.

The ASME is a technical society which, among other activities, has taken upon itself the responsibility for promulgating and, to a certain extent, policing "voluntary" standards for the design, maintenance and performance of certain industrial and commercial equipment, including boilers and pressure vessels. The Boiler and Pressure Vessel Committee of ASME (hereinafter the "Main Committee") has formulated and issued a "Boiler and Pressure Vessel Code" (hereinafter the "Code") as such a standard. Section IV of that Code sets forth certain requirements for boiler controls, including boiler water level controls such as those manufactured by Hydrolevel and M&M/ITT. Because this and other similar ASME codes have been incorporated by reference into the laws of numerous local, state and federal jurisdictions, a product deemed not to be in compliance with the Code is virtually unmarketable in the United States.

Since the Code is in need of occasional revision and interpretation, the Main Committee has established subcommittees to perform such functions. These subcommittees are made up of officials of companies engaged in the various related industries and are assisted by full-time staff employees of the ASME. At the time Hydrolevel was attempting to break into the boiler control market, senior officials of M&M/ITT and Hartford Steam (which was also affiliated with ITT) held the strategic positions of Chairman and Vice-Chairman of the Section IV Heating Boiler Subcommittee, the subcommittee having jurisdiction over the interpretation of Code provisions relating to boiler controls. Officials of no other boiler water level control manufacturer had ever been members of this particular subcommittee or, for that matter, of its parent, the Main Committee.

In early 1971, after five years of exploratory sales efforts and product refinement (during which it was loyally supported by its lender, a venture capital affiliate of the Chase Manhattan Bank), Hydrolevel achieved a sales breakthrough. Brooklyn

Union Gas Company, a major gas utility and gas appliance retailer in the New York metropolitan area, concluded in late February 1971, after exhaustive in-house testing, that it would specify the Hydrolevel "probe" control for use on *all* Brooklyn Union boilers, replacing the M&M/ITT "float" control. Brooklyn Union purchased, on a wholesale basis, large quantities of residential and commercial boilers from three or four leading manufacturers. Such a dramatic switch in product specification by a major customer in the industry threatened to cause the entire boiler industry to re-evaluate its long-standing reliance on the "float" sold by M&M/ITT.

In early April 1971, and within several weeks of Brooklyn Union's decision, a meeting was held in Chicago, ostensibly to discuss whether the Hydrolevel product met the requirements of the ASME Code. The meeting was attended by the two officers of M&M/ITT and Hartford Steam, John James and T. R. Hardin, who held the senior positions on the ASME's Heating Boilers Subcommittee, and two other top executives from M&M/ITT, Eugene Mitchell, the Company's Vice President in charge of sales, and James Solon, the President of M&M/ITT. These men concocted a scheme to protect M&M/ITT's monopoly position in the market by having the ASME raise doubts as to the ability of Hydrolevel's product to satisfy the standards of the Code. A letter of "inquiry" was drafted by these individuals and submitted to the ASME staff, which routed the letter back to one of the original drafters for response. The resulting "official" ASME interpretative letter, dated April 29, 1971, was carefully worded to imply that the Hydrolevel product did not satisfy the Code.

The letter was widely distributed to, and discussed with, potential boiler water level control purchasers by M&M/ITT and was cited as evidence that the Hydrolevel product did not "meet the Code." As would be expected in an industry that regarded disapproval by the ASME as something akin to the mark of Cain, the Hydrolevel control did not thereafter achieve the wide acceptance in the U.S. market that the evidence showed, and that the jury found, would otherwise have followed the Brooklyn Union decision to "standardize" on Hydrolevel. By contrast, the record is uncontroverted that in Canada,

where the ASME letter was not circulated, Hydrolevel's probe displaced M&M/ITT's float as the dominant product. Indeed, in 1974, having obtained the necessary lead-time by use of the ASME letter, M&M/ITT *itself* developed a "probe" control by "inventing around" Hydrolevel's patents and is today successfully marketing what is essentially a copy of Hydrolevel's control.

In January 1972, upon learning of the existence of the April 29, 1971, ASME letter, Hydrolevel demanded that the ASME provide it a complete copy of the letter. For reasons of "policy," the ASME refused. Nevertheless, after seeing only a portion of the letter, Hydrolevel complained to the ASME that the letter was causing grievous and perhaps irreparable damage to Hydrolevel in the marketplace. Hydrolevel asked the ASME to send a corrective letter to all those in the industry who could reasonably have been expected to hear of the original April 1971 letter and its purported interpretation of the Code.

The Main ASME Committee prepared a draft letter responding to the Hydrolevel request which was written in part by the very same M&M/ITT executive responsible for the original April 1971 ASME letter, John James. The first paragraph of this draft (not quoted in the Court of Appeals' opinion) "confirmed the intent" of the original letter, was couched in technical language and made no reference to Hydrolevel by name or to the original letter. The draft was circulated as the sixth appendix to over fifty (50) pages of Committee minutes solely to the ninety-two (92) organizations who had representatives in attendance at a Main Committee meeting held in May 1972. Of the individuals receiving the draft letter, only *one* was a representative of a substantial, potential direct purchaser of boiler controls.[3] The draft was finalized on June 9, 1972, without substantive change and sent *only to Hydrolevel.* The ASME refused Hydrolevel's request

[3] Apparently relying upon a false statement in the ASME's reply brief, the Court of Appeals incorrectly concluded that this draft letter was "sent to over 300 people active in the boiler market." App. 23a. There is no support for this statement in the record.

that a "corrective statement" be printed in the ASME magazine to reach as many people in the trade as possible.

It was this June 1972 letter that the Court of Appeals repeatedly characterized as the "retraction" by the ASME which allowed the ASME to escape liability for the damage caused by its prior conspiratorial conduct but suffered by Hydrolevel *after* the "retraction."

As noted above, the jury found that the ASME had participated in a conspiracy to restrain trade and to monopolize the market, the objective of which was to exclude Hydrolevel from the market. The ASME's defense was based solely upon an argument that it should not be held liable for the acts of its Committee officers, a contention properly rejected by the Court of Appeals. *At no time during the district court or appellate proceedings did the ASME ever plead, argue or offer any evidence to support a claim that the June 1972 letter constituted a "retraction" of the original April 1971 ASME letter or that the ASME had "withdrawn" from the conspiracy.* Nevertheless, acting *sua sponte,* the Court of Appeals apparently decided that the ASME should not be held responsible for Hydrolevel's demise because it had "retracted" its role in the conspiracy before the plaintiff went out of business.

During the damage phase of the trial, Hydrolevel introduced evidence (through the testimony of three expert witnesses) that the damages to Hydrolevel resulting from the ASME's conspiratorial conduct ranged from $5.3 million to $7.6 million. These estimates were based upon several independent but complementary methods of calculation and followed the experts' conclusion that, "but for" the conspiracy and the ASME's April 1971 letter, Hydrolevel would have achieved a market share of between 10% and 25%. As noted above, in Canada, where the market was "untainted" by the conspiracy, Hydrolevel had achieved a far larger market share. *The ASME did not object to the introduction of this evidence.* Although the ASME's only damage witness criticized the calculations made by Hydrolevel's experts, he candidly acknowledged that the theories underlying them were proper and were generally accepted methods for calculating antitrust damages. Most

significantly, the ASME's damage expert testified that the appropriate damage award could range up to the lowest estimate put forward by the Hydrolevel experts, or $5.3 million.

After the district court charged the jury with the ASME's own proposed charge, the jury returned a verdict in favor of Hydrolevel in the amount of $3.3 million, a figure less than two-thirds of the lowest of the estimates provided by Hydrolevel's witnesses.[4]

In reversing the jury's damage award and remanding the case for a new trial on damages, the Court of Appeals relied primarily upon its holding that, as a matter of law, the ASME could "retract" its original conspiratorial conduct to avoid further liability, apparently even for continuing damage caused by its prior acts, and that the June 1972 letter constituted such a "retraction." The Court of Appeals also concluded that the award was "excessive" because M&M/ITT and Hartford Steam were "far more culpable than ASME" in the conspiracy, noting that "the matter of contribution among joint tortfeasors in antitrust suits is before the Supreme Court . . . ." App. 26a. The facts that Hydrolevel operated at a loss during its entire existence and "never at anytime reached 1% of the market,"[5] in the Court's view, made the damage estimates of Hydrolevel's experts "open to serious question." App. 22a. The Court reasoned that no further analysis was required because the ASME's liability for damages "caused Hydrolevel by the conspiracy" extended only to the period prior to the "retraction" and a "reasonable time" thereafter. The Court held that:

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[4] At the hearing on ASME's motion for judgment notwithstanding the verdict, Judge Weinstein observed that, although he would not have found damages in the amount awarded by the jury, he would not overturn the verdict in the face of the overwhelming evidence in the case supporting the jury's award, including the admission by the ASME's own witness that the amount awarded by the jury was in the range of reasonableness.

[5] These observations were not entirely accurate. The record is uncontradicted that in 1978 Hydrolevel did earn a small profit and that from 1972 until the date of trial Hydrolevel's market penetration ranged between 1% and 1.5%.

> a suitable retraction of the misinterpretation in the April 1971 letter was all that was required to free it from further liability for any damages caused by the conspiracy. Thus, [ASME's] responsibility for damages was at an end when it provided Hydrolevel with the means of correcting the false impressions caused by the April 1971 letter which M&M had been using.

App. at 23a.

REASONS FOR GRANTING THE WRIT

I. The Holding of the Court of Appeals Is Inconsistent With Established Principles Enunciated by this Court Governing the Liability of a Conspirator for the Damage Caused by the Conspiracy.

In order to overturn the jury's award of damages, which the Court of Appeals considered disproportionate to the ASME's role in the unlawful conspiracy (App. 26a), and noting that the matter of contribution among joint tortfeasors in antitrust suits was before this Court in *Texas Industries Inc. v. Radcliffe Materials,* 604 F.2d 897 (5th Cir. 1979), *cert. granted,* 101 S. Ct. 351 (1980) (No. 79-1144), the Court, *sua sponte,* fashioned a new rule of law by allocating among conspirators according to their relative culpability the liability for damages caused by their conspiracy. Although enunciated in an antitrust case, this new rule is applicable to all types of conspiracy cases. According to the Court of Appeals, a conspirator can avoid liability for the effects of the conspiracy simply by giving the victim a "suitable retraction" of the conspirator's original unlawful conduct. Such a "retraction" would apparently be sufficient to end a conspirator's "responsibility for damages," even for the damage continuing to flow from the pre-"retraction" acts of the conspirators. This new legal theory, which was not advanced by ASME at trial or on appeal and is not supported by citation to any authority, is inconsistent with several decisions of this Court and presents an issue of such importance to the future application of the nation's antitrust and conspiracy laws that the issuance of a writ of certiorari to review the opinion of the Court of Appeals is warranted.

(a) The Court of Appeals' Opinion Undermines the Concept of Joint and Several Liability Among Joint Tortfeasors.

It is well established that every participant in a conspiracy is liable for all of the reasonably foreseeable damage flowing from the conspiracy.

> Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining the question of the different degrees of culpability. And if but one is sued, he is liable for all the damages inflicted by the most culpable.

Washington Gaslight Co. v. Lansden, 172 U.S. 534, 552 (1899). The district court's instruction to the jury was entirely consistent with this standard, a standard which the ASME's own proposed instructions incorporated and which the Court of Appeals now rejects.

By comparing the relative "culpability" of the ASME to that of the settling conspirators and determining that the ASME should not bear the full burden of liability for the destruction of the plaintiff's business, the Court of Appeals has gone beyond the matter of contribution among antitrust conspirators which is currently before this Court. In effect, the Court has ordered the *victim* to "contribute" to the "less culpable" conspirator by receiving less than the full measure of its damage caused by the conspiracy whenever that conspirator has furnished the victim a "suitable retraction" before the full impact of the conspiracy has been felt.[6] This *ex post facto* revision of the long-established

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[6] The Court's conclusion that the ASME would be unfairly penalized if it had to bear the burden of the entire damage caused Hydrolevel because the April 1971 letter was its sole contribution to the conspiracy is difficult to reconcile with the most fundamental principle in our legal system that one who causes an injury, even if through a momentary act of negligence, is responsible for the damage caused, *no matter how great.* The uncontroverted evidence before the jury showed, and the Court of Appeals does not question, that it was the ASME's April 1971 letter that led directly to Hydrolevel's ultimate failure.

legal principle of joint and several liability has clearly compromised Hydrolevel's right to be made whole because Hydrolevel's willingness to settle with M&M/ITT and Hartford for substantially less than the full damage it suffered was based upon the assumption that it could proceed against the ASME for the difference between the settlement figure and the total amount of its damages. This new rule of "comparative culpability" not only will clearly discourage future plaintiffs from settling with some, but not all, conspirators, but also will encourage defendants to litigate fully the issue of relative culpability.

(b) The Court of Appeals' New "Retraction" Theory Is Contrary to Long-Standing Principles Governing the Defense of "Withdrawal" in Conspiracy Cases.

The only way in which a conspirator has ever been able to avoid full liability for any of the consequences of a conspiracy once it has been set in motion is to withdraw from the conspiracy. *Levine v. United States,* 383 U.S. 265, 266 (1966) (per curiam). There is no other means of mitigating a conspirator's liability. Withdrawal, however, has never been held to immunize the conspirator from liability for damage flowing from acts he performed in furtherance of the conspiracy because, by definition, those acts were performed at a time *prior* to withdrawal, even though the resulting damage may not have occurred until later. Moreover, the defense of withdrawal must be pleaded and affirmative proof by the defendant of an effective withdrawal is required. The requirements necessary to demonstrate a withdrawal were defined by this Court in *Hyde v. United States,* 225 U.S. 347, 369 (1912), which held that a conspirator must have performed some affirmative and unequivocal act to effectively disavow or defeat the purpose of the conspiracy in order to effectively withdraw from the conspiracy. In the absence of such definite proof of such a positive and unequivocably communicated withdrawal, it will not be presumed. These principles have been followed in every circuit, including the Second Circuit. *See, e.g., United States* v. *James,* 609 F.2d 36 (2d Cir. 1979), *cert. denied,* 445 U.S. 905 (1980).

The decision of the Second Circuit in this case, which does not mention the concept of withdrawal from a conspiracy,

establishes a new and infinitely easier way for a conspirator to avoid the consequences of his unlawful activity and is in direct conflict with the entire body of law regarding withdrawals from conspiracies. Indeed, in derogation of all prior precedent on the subject, the Court of Appeals' new defense expressly places the burden of proof (or actually disproof) concerning the effectiveness of the "retraction" upon the victim, not upon the conspirator, and apparently holds that the "retraction" absolves the conspirator from responsibility for subsequent damage caused by the conspirator's acts performed prior to the "retraction."[7]

(c) The Decision of the Court of Appeals Is Inconsistent With the Basic Objectives of the Antitrust Laws.

The federal antitrust laws are designed to promote and protect a free and competitive economy by compensating victims of anticompetitive activity, by depriving those who violate the law of the fruits of their illegal acts, and by punishing violators with criminal and treble-damage liability in order to deter future anticompetitive acts. *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 746 (1977).

The opinion of the Court of Appeals in this case subverts each of these objectives and is fundamentally inconsistent with

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[7] By choosing to characterize the June 1972 letter as a "retraction" the Court of Appeals has engrafted a concept from the law of libel onto the antitrust laws. However, even the law of libel requires far more of a "retraction" than the Court of Appeals required of the ASME for it to avoid liability. It is well settled that in order for a "retraction" to be effective it must be

> a full and unequivocal one, which does not contain lurking insinuations, hypothetical or hesitant withdrawals, or new calumnies in disguise. It must, in short, be an honest endeavor to repair all of the wrong done by the defamatory imputation, or it will merely aggravate the original offense.

W. Prosser, *Handbook of the Law of Torts* 827 (3d ed. 1964) (footnotes omitted). Moreover, a retraction of a libelous statement may be shown in mitigation of the damages incurred by a plaintiff, but not as a total avoidance of liability, as suggested by the Court of Appeals.

all of them. If, as this Court has said, a plaintiff who is *in pari delicto* with the defendant is a worthy representative of the public interest in seeking treble damages, so too should Hydrolevel be entitled to its full measure of damage from the effect of a conspiracy.

> The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968).

In view of the deep and abiding interest of the *public* in a competitive economy, and in view of the clear congressional mandate that private antitrust enforcement is a critically important method of guaranteeing this public goal, it was plain error for the Court of Appeals to fashion a new rule permitting antitrust conspirators to "retract" their contributions to an ongoing conspiracy. Unlike the law governing responsibility for libelous statements, which is designed solely to remedy a private wrong, the public has an interest in the deterrent value of the antitrust laws. The Court of Appeals, by weighing the relative culpability of the conspirators and by injecting libel law concepts into the antitrust laws, has chosen to ignore that Congressional mandate.

II. The Conclusion of the Court of Appeals That the Jury's Award of Damages Was "Excessive" Was Improper and Inconsistent With Prior Decisions of this Court.

This Court has consistently held that the standard of appellate review of jury damage awards, where the district court has denied a motion to set aside the verdict as excessive, is whether the verdict is so high as to shock the judicial conscience *and* to constitute a denial of justice. *E.g., Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 159 (1968); *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944). It is important to

note that the Court of Appeals in this case did *not* make such findings; nor did it find that Judge Weinstein had erred or had abused his discretion in denying the ASME's post-trial motion to set aside the award as unsupported by the evidence or as the result of "passion and prejudice." Indeed, the record would have supported a higher award, as conceded by ASME's own expert.

Although it did not find that the record failed to support the award, the Second Circuit's opinion did suggest that the jury's award resulted from "uncertainties and errors" in Hydrolevel's evidence, focusing upon two aspects of the plaintiff's presentation. First, the panel apparently concluded that the fact that Hydrolevel had operated at a loss throughout its existence somehow made the estimate of lost future profits "tenuous." The panel also criticized the estimates of Hydrolevel's ultimate market share "but for" the effects of the conspiracy (ranging from 10% to 25%) on the ground that Hydrolevel had not achieved 1% of the market before it was liquidated.

While these criticisms were not the expressed basis for the panel's reversal of the damage award, it is clear that they underlie the Court of Appeals' novel "retraction" theory and, moreover, are irreconcilable with this Court's decisions in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); and *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). As these cases emphasize, there will *always* be "uncertainties and errors" in any assessment of the damage suffered by a firm unlawfully excluded from a market before it can establish a true "track record." This is particularly true when, as here, the plaintiff would have had the only innovative product on the market for a few years while its competition was seeking to "invent around" the new product. Thus Hydrolevel had a wide-open but short-lived "window" through which it could have passed to establish a foothold in the market to erode the monopoly position of M&M/ITT but for the conspiracy. Indeed, the conspirators had slammed the "window" shut before the so-called "retraction" letter ever went out. The

damages apparently contemplated by the Court of Appeals — lost profits for the period between the April 1971 letter and a "reasonable period" beyond the date of the 1972 "retraction" letter — would leave the injured plaintiff with only meager compensation for its destroyed future and would leave the injured public with an unchastized and unrepentant conspirator and a market still controlled by the conspiring monopolist.

In *Bigelow*, this Court specifically recognized the difficulty in determining damages in a market exclusion case and held that "the wrongdoer shall bear the risk of the uncertainty [of proof of damages] which his own wrong has created." 327 U.S. at 265. *Accord, Zenith Radio Corp. v. Hazeltine Research Co., Inc.*, 395 U.S. at 124. Mr. Justice White in *Zenith* cautioned trial and appellate courts that proof of damages in these market exclusion cases "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." 395 U.S. at 123. Indeed, a jury is entitled to

> "make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' "

395 U.S. at 124 (quoting from *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. at 264). None of these cases gave the Court of Appeals the authority to weigh its view of the damage evidence against its view of a particular conspirator's culpability.

In Canada, a market untainted by the conspiracy, the Hydrolevel product quickly *took over* the market, a fact undisputed in the record but overlooked by the Court of Appeals' opinion. This is the identical "yardstick" that this Court expressly approved as a measure of damages in the *Zenith* case and which was used as one measure of damages by Hydrolevel's experts. Indeed, the facts in the instant case are a mirror image of those in *Zenith*. There, this Court reinstated a damage award in favor of Zenith for its exclusion from the Canadian market based upon the "yardstick" of its market performance in the U.S., precisely the type of calculation included as one of several theories of damage estimates presented by Hydrolevel's experts.

The Second Circuit's conclusions as to the excessiveness of the jury's damage verdict are unsupported and improper. The imposition of a higher standard of proof of antitrust damages than was required under this Court's decisions in *Bigelow* and *Zenith* alone warrants a review of the Court of Appeals' decision.

CONCLUSION

The opinion of the Court of Appeals, reversing the jury's award of damages, is inconsistent with numerous decisions of this Court. Although the plaintiff's damage calculations were made according to principles repeatedly enunciated by this Court, the estimates of plaintiff's damages were placed before the jury without objection, the jury's ultimate verdict was significantly below the *lowest* of those estimates and in the range specifically acknowledged to be reasonable by the defendant's only expert witness, and the trial court refused to set aside the verdict as excessive and found it to be justified by the evidence, the Court of Appeals weighed both the evidence and the "culpability" of the defendant-conspirator. Finding the jury's award to be "excessive," the Court of Appeals created two new corollaries to the law of conspiracy, *viz*, comparative culpability and the principle of "retraction," so that the final award of damages to Hydrolevel would be in line with its own views of how much the ASME's participation in the conspiracy should require it to pay. Not only is the Court of Appeals' decision an injustice to Hydrolevel, whose efforts as an innovative entrepreneur seeking to penetrate a moribund and monopolistic market were precisely what the antitrust laws were designed to encourage and protect, but it is a serious blow to private antitrust enforcement generally and deserves the attention and consideration of this Court.

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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